

NO. AAN-CV18-6026839-S : SUPERIOR COURT
HUSH IT UP, LLC : J.D. OF ANSONIA-MILFORD
VS. : AT MILFORD
PLANNING AND ZONING COMMISSION OF
THE CITY OF SHELTON : JULY 1, 2019

MOTION FOR CONTEMPT

In a memorandum of decision issued on May 8, 2019, the Court (Hiller, J.T.R.) sustained the appeal of Hush It Up, LLC ("Hush") and reversed the decision of the Planning and Zoning Commission of the City of Shelton (the "PZC") which had denied the application of Hush for a certificate of zoning compliance for the property at 303 Old Bridgeport Avenue in Shelton. The Court remanded the case to the PZC to address further one discrete aspect of the application for a certificate of zoning compliance, i.e., the determination of the requirements for off-street parking.

The PZC did not petition the Appellate Court for certification for review of the Court's decision. Yet nearly eight weeks after that decision, despite some prodding from Hush, the PZC has still not done what the Court ordered it to do.

After the hearing in this case which was held on March 7, 2019, the Court ordered the parties to answer a number of questions in supplemental, post-hearing briefs. Question No. 4 was, "What regulation directed the number of on and/or off-site parking spaces for this use?" Hush answered that question (in Docket Entry No. 122.00) as follows:

ORAL ARGUMENT REQUESTED
TESTIMONY REQUIRED

There is no regulation in the Regulations which directs the number of on-and/or off-site parking spaces for this use. The only prescribed minimum number of off-street parking spaces in an RBD zone in the Regulations is set forth in Section 33.18.4 thereof and applies only to restricted retail outlets and business and professional offices. Section 42 of the Regulations generally governs off-street parking. Section 42.2 of the Regulations, which states "Off-street parking spaces shall be provided in accordance with the following minimum standards" (emphasis in original) does not prescribe a minimum standard for an RBD zone or for a café use in any zone.

The PZC answered that question (in Docket Entry No. 123.00) as follows:

Assuming arguendo that the requested use is allowed. [sic] As a cocktail lounge with more than 16 seats it would still fail. (See Parking Regulations below):

42.1 General: It is the purpose and intent of this Section to assure that parking spaces and loading spaces are provided off the street in such number and location and with suitable design and construction to accommodate the motor vehicles of all persons normally using or visiting a sue, building or other structure at any one time. Off-street parking and loading spaces required to be provided by this Section shall be permanently maintained and made available for occupancy in connection with and for the full duration of the use of land, buildings and other structures for which such spaces are herein required. If any existing use of land, building or other structure is changed to a use requiring additional off-street parking and loading spaces to comply with this Section, the additional spaces shall be provided for the new use in accordance with the standards to the extent that it conforms at the time of adoption of these Regulations. Any existing use which does not conform to the standards of the Section shall not be changed to a use which would need additional off-street parking and loading spaces to comply with the standards herein unless there is available off-street parking and loading spaces to comply with the standards herein unless there is available off-street parking and loading spaces for such new use as required by this Section. All off-street parking and loading spaces hereafter established, whether required to be provided by this Section or not, shall conform to the design and construction standards hereinafter specified as well as to any standards and conditions for approval of a Site Plan or Special Exception under these Regulations.

42.2 Parking Space Standards: Off-street parking spaces shall be provided in accordance with the following minimum standards. Parking must be located on the same lot as the use it serves unless the Commission approves parking on another lot as authorized herein as part of a Site Plan or Special Exception approval. In no case shall required spaces be located more than 500 feet from the entrance to the use they serve. As required by the Americans With Disabilities Act (ADA), designated parking for disabled persons shall be provided for all uses. Each such space shall be marked with one international accessibility symbol and posted with a sign in accordance with the ADA. Said space shall be located as close as practical to an accessible entrance to the use it serves. Striping specifications for said spaces shall comply with the ADA and its sign must be placed so that it is not obscured by a vehicle parked in that space. All off-street parking requirements shall not be subject to variance by the Zoning Board of Appeals without the consent of the Commission.

[Emphasis on the word "minimum" in Section 42.2 deleted.]

Attached as Appendix B are the parking regulations for Shelton. The regulations were modified in 2013 and appear on the Appellee's website as a separate document. These are the regulations which the Fire Marshall [sic] reviewed to prepare his report of December 6, 2017.

The Court addressed the parking requirement issue in its memorandum of decision as follows:

The court is not persuaded by the commission's argument that the fire marshal's decision was guided by the regulations. The sections referred to by the commission do not provide for minimum standards for RBD zones or for the type of property described in the plaintiff's application. Furthermore, the commission, in their supplemental brief, has failed to provide any formula used by the fire marshal to determine that the property would require seventeen parking spaces. Accordingly, the court finds that the commission's reliance on the fire marshal's occupancy finding was not supported by the record and therefore, the issue of off-street parking is remanded to the commission with instructions that it conduct a further review of the records to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements.

Hush respectfully represents that on May 15, 2019, counsel for Hush spoke to counsel for the PZC who agreed to let Hush know by May 31, 2019 where the PZC stood with respect to the parking issue and getting the Certificate of Zoning Compliance issued by the PZC. Counsel for the PZC explained that input was needed from the City Planner, but the Planner was on vacation and upon his return would be tied up with the budgeting process. After not hearing by May 31st, counsel for Hush inquired further on June 3, 2019, without receiving a response. Counsel for Hush then sent a letter to counsel for the PZC via email on June 6, 2019, a copy of which is annexed hereto as Exhibit A. In that letter, counsel pointed out: (1) that there were far more off-street parking spaces available to Hush than even the Fire Marshal claimed were needed; (2) that the matter needed to be placed on the agenda of the regular June 2019 meeting of the PZC or on the agenda of a special meeting in June; and (3) "[a]s an alternative, given the lack of a regulation prescribing a minimum standard for an RBD zone or for a café use in any zone, and the fact that that will probably make it impossible for the PZC to 'conduct a further review of the record to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements', I respectfully suggest that the Zoning Enforcement Officer, acting under his authority in Regulation Section 2.1, issue the Certificate of Zoning Compliance without setting a minimum number off-street parking spaces, obviating the need to bring this matter before the PZC." Counsel for Hush concluded by stating, "Further delay cannot and will not be tolerated, as my client is losing money every day that the certificate of zoning compliance is not issued. The Court has continuing jurisdiction over this matter. If this

matter is not placed on an agenda in June as I have requested, or the Zoning Enforcement Officer does not issue the Certificate of Zoning Compliance as I have suggested, I will have no choice but to bring this matter back to court on a motion for contempt."

On June 11, 2019, without notice to Hush, the PZC took up the matter of the parking requirement in executive session of its regular monthly meeting. It then referred the matter to the City Planner to determine the parking requirement. Hush has heard nothing further since then. Although it is questionable what the City Planner could do other than look at the Regulations which have already been examined, analyzed and addressed by both parties and by the Court, and although it would take to City Planner perhaps 30 minutes to look into this matter if he were to turn his attention to it, there is no end in sight and there is no pressure on the PZC to do move the proverbial needle. In the meantime, Hush remains unable to open for business while continuing to incur rent expense of \$2,500 per month (see ROR, Item No. 9.) during the course of the PZC's post-judgment failure to act, and is incurring attorney's fees in filing and pursuing this motion.

The reversal of the PZC's denial of Hush's application for a certificate of zoning compliance plainly requires the PZC to issue the certificate of zoning compliance. The Superior Court has the inherent authority to enforce its orders. AvalonBay Communities, Inc. v. Plan & Zoning Commission, 260 Conn. 232, 246, 796 A.2d 1164 (2002); Bauer v. Bauer, 308 Conn. 124, 130, 60 A.3d 950 (2013). That inherent power includes the power to coerce compliance with its orders by fining the contemnor. Papa

v. New Haven Federation of Teachers, 186 Conn. 725, 737-738, 444 A.2d 196 (1982).

“[E]ven in the absence of a finding of contempt, the trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order.” (Internal quotation marks omitted.) AvalonBay Communities, Inc. v. Plan & Zoning Commission, supra, at 243, 796 A.2d 1164.” Rozbicki v. Gisselbrecht, 152 Conn. App. 840, 846, 100 A.3d 909 (2014).

Contempt is a disobedience to the orders of a court which the court has power to punish. In re Jeffrey C., 261 Conn. 189, 196, 802 A.2d 772 (2002). " 'Contempts of court may be classified as either direct or indirect, the test being whether the contempt is offered within or outside the presence of the court.' (Internal quotation marks omitted.) Bunche v. Bunche, 36 Conn.App. 322, 324, 650 A.2d 917 (1994). 'A finding of indirect civil contempt must be established by "sufficient proof" that is premised on competent evidence presented to the trial court and based on sworn testimony.... A trial-like hearing should be held if issues of fact are disputed.' (Citation omitted.) Id." Kusznir v. Zoning Board of Appeals of City of Shelton, 60 Conn. App. 497, 501, 759 A.2d 1036 (2000).

“ 'Our case law classifies civil contempt as conduct directed against the rights of the opposing party ... while criminal contempt consists of conduct that is directed against the dignity and authority of the court.' (Citations omitted.) Ullmann v. State, 230 Conn. 698, 707, 647 A.2d 324 (1994). '[I]t is the nature of the relief itself that is instructive in determining whether a contempt is civil or criminal. A contempt fine is civil if it either coerce[s] the defendant into compliance with the court's order, [or] ...

compensate[s] the complainant for losses sustained....' (Internal quotation marks omitted.) Id., at 709–10, 647 A.2d 324." In re Jeffrey C., supra, at 197-198.

Accordingly, the Plaintiff respectfully requests that the Court, grant this motion by finding the PZC in civil contempt and order it to pay Hush a compensatory fine of \$5,000 per month and a reasonable attorney's fee for the cost of pursuing the instant motion for contempt and to enforce the judgment, and order further that the PZC may purge itself of the contempt order by issuing Hush a certificate of zoning compliance, or directing the Zoning Enforcement Officer to issue a certificate of zoning compliance, forthwith.

The Appellant, HUSH IT UP, LLC

By: /s/ 305638
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Juris Number 305638
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Its Attorney

CERTIFICATION

I hereby certify that a copy of the above was electronically delivered on July 1, 2019 to all counsel of record and that written consent for electronic delivery was received from all counsel of record who were electronically served, at:

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/s/ 305638
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EXHIBIT A

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June 6, 2019

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Re: Hush It Up, LLC v. Planning and Zoning Commission of the City of Shelton
Docket No. AAN-CV18-6026839-S

Dear Fran:

As you know, in his decision issued on May 8, 2019, Judge Hiller reversed the decision of the Planning and Zoning Commission of the City of Shelton (the "PZC") which had denied the application of Hush It Up, LLC ("Hush") for a certificate of zoning compliance for the property at 303 Old Bridgeport Avenue in Shelton, and the case was "remanded to the commission to review the formula used in determining the requirements for off-street parking." More specifically, the Court "finds that the commission's reliance on the fire marshal's finding was not supported by the record and therefore, the issue of off-street parking is remanded to the commission with instructions that it conduct a further review of the record to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements." The appeal of Hush was sustained, and the decision of the PZC was reversed, in all other respects.

You will recall that Question No. 4 which Judge Hiller asked the parties to address in supplemental, post-hearing briefs was, "What regulation directed the number of on and/or off-site parking spaces for this use?" The Court found that "the commission, in their supplemental brief, has failed to provide any formula used by the fire marshal to determine that the property would require seventeen parking spaces." The Court adopted what I had written in Hush It Up, LLC's supplemental brief, *i.e.*, that there is no regulation in the Zoning Regulations of the City of Shelton (the "Regulations") which directs the number of on- and/or off-site parking spaces for this use. The only prescribed minimum number of off-street parking spaces in an RBD zone in the Regulations is set forth in Section 33.18.4 thereof, and it applies only to restricted retail outlets and business and professional offices. In Section 42 of the Regulations, which generally governs off-street parking, Section 42.2 states "Off-street parking

spaces shall be provided in accordance with the following minimum standards..." (emphasis in original), but the Regulations do not prescribe a minimum standard for an RBD zone or for a café use in any zone.

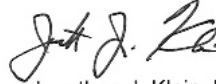
Nearly a month has passed since Judge Hiller issued his ruling. The 20-day time frame prescribed in Practice Book § 81-1(a) in which the PZC could have petitioned the Appellate Court for certification for review of Judge Hiller's decision expired on May 28, 2019 without a petition having been filed. The PZC must put this matter on its agenda without delay. According to the webpage of the PZC, "The Planning and Zoning Commission conducts their regular meetings on the second Tuesday of each month at 7:00 P.M. in Room 303. Special Meetings are conducted on an as need basis and are usually held on the fourth Wednesday of the month." The next regular meeting of the PZC is scheduled for June 11th, and the next special meeting of the PZC is scheduled for June 18th. I respectfully request that this matter be placed on one of those agendas, and that I be promptly informed of the scheduling. At the latest, a special meeting should be scheduled for June 26th, the fourth Wednesday of the month, to resolve the parking issue.

As an alternative, given the lack of a regulation prescribing a minimum standard for an RBD zone or for a café use in any zone, and the fact that that will probably make it impossible for the PZC to "conduct a further review of the record to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements", I respectfully suggest that the Zoning Enforcement Officer, acting under his authority in Regulation Section 2.1, issue the Certificate of Zoning Compliance without setting a minimum number off-street parking spaces, obviating the need to bring this matter before the PZC. Please note that the lower parking level of the property has 14 parking spaces, the upper parking lot which has been vacated by the Hunan Pan Restaurant, has another 20 or more spaces, and there is an easement for 10 more spaces directly across Sunwood Drive from the upper parking lot entrance¹, so there are far more spaces available than even the Fire Marshal thinks are needed. Off-street parking is truly a non-issue.

¹ The owner of 303 Bridgeport Avenue is Chu Uen Ko, who purchased the property from Thomas H. Mohyde and I. Frances Mohyde by warranty deed dated March 30, 2007, which was recorded on the Shelton land records on April 3, 2007 in Volume 2804 at Page 48. That deed reflects the fact that 303 Bridgeport Avenue was conveyed to Mr. Ko "together with and subject to the terms of an easement agreement between J. Thomas Mohyde and I. Francis [sic] Mohyde and Jean Cayer, Trustee and Jules P. Cayer, dated November 18, 1981 and recorded on December 15, 1981 in Volume 455 at Page 49 of the Shelton Land Records." That easement agreement provides for an easement for parking on "Parcel F" on a certain map dated April 7, 1981. The parking easement goes on to provide, "Such rights shall also be in common with Cayer, provided, however, that Mohyde shall have the exclusive right to use such area for the parking of at least 10 motor vehicles at all times." In other words, the property at 303 Bridgeport Avenue has the right to use an unlimited number of parking spaces, at least 10 of which are exclusive to it, anywhere on "Parcel F."

Further delay cannot and will not be tolerated, as my client is losing money every day that the certificate of zoning compliance is not issued. The Court has continuing jurisdiction over this matter. If this matter is not placed on an agenda in June as I have requested, or the Zoning Enforcement Officer does not issue the Certificate of Zoning Compliance as I have suggested, I will have no choice but to bring this matter back to court on a motion for contempt.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jonathan J. Klein". The signature is stylized with a large, looped "J" and "K".

Jonathan J. Klein, Esq.

cc: Hush It Up, LLC